BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	R. 06-10-005

REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES

I. INTRODUCTION AND SUMMARY

Pursuant to Rule 6.2 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure and the schedule set forth in Rulemaking (R.) 06-10-005, the Division of Ratepayer Advocates (DRA) submits these Reply Comments on the Commission's Rulemaking to adopt a new General Order (GO) and institute new procedures to implement Assembly Bill (AB) 2987, the Digital Infrastructure and Video Competition Act of 2006 (DIVCA). Below we provide our response to a number of issues raised by carriers, local governments and other groups in their Opening Comments. Silence on any particular issue by DRA should not be construed as agreement or disagreement with any party's positions.

II. DISCUSSION

A. Scope of Commission Authority

A common theme in the Opening Comments of the carriers is the contention that adoption of the draft GO as written would result in the Commission exceeding the authority conferred upon it by DIVCA.[1] They are wrong, as DRA explains below. The draft GO closely tracks the legislation and does not create some sort of "back door" expansion of the Commission's jurisdiction.

1. Notice of Increases or Decreases in Service Territory

The Commission correctly recognizes in R.06-10-005 that AB 2987 limits its authority even though it is the "sole franchising authority" for video franchises in the state.

> The Commission's authority over the state video franchise application process may not exceed the provisions set forth in Public Utilities (PU) Code § 5840. The Legislature also made it clear that it intended for the Commission only to perform those duties described in the provisions on franchising (§ 5840), anti-discrimination (§ 5890), reporting (§§ 5920 and 5960), cross-subsidization prohibitions (§ 5940), and regulatory fees (§ 401, §§ 440-444, § 5840). We intend to adhere to the Legislature's clear restrictions.[2]

Nevertheless, AT&T California asserts that the Commission has exceeded its authority with respect to the draft GO's "proposed procedures regarding changes to service areas."[3] It asserts that the draft GO inadvertently adds a prior approval

[1] Verizon Comments, pp. 4-5; AT&T California Comments, pp. 2-3.

[2] Rulemaking, p. 5.

[3] AT&T California Comments, pp. 2-3.

process for amendments beyond what is contemplated by AB 2987.[4] AT&T California points to § 5840(m)(6): "The holder shall describe the new boundaries of the affected service areas after the proposed change is made" and emphasizes the "*after"* in this language. AT&T California concludes from this language that the Commission's authority is limited to receiving notice of service boundary changes.

The language AT&T California quotes, however, must be read in conjunction with the earlier provision of § 5840 which states: "The Commission may establish procedures for a holder of a state-issued franchise to amend its franchise to reflect changes in its service area." Section 5840(m)(6) when read in the context of § 5840 as a whole, demonstrates that the Commission's proposed procedures as set forth in draft GO at VI.B.2 are wholly within the scope of the legislation:

> A State Video Franchise Holder seeking a Video Service amendment (whether an increase or decrease) shall file a supplemental Application to its initial Application that clearly shows the *new boundaries* of the affected service areas, describe *any and all Local Entities impacted by the new service area*…."[5]

Furthermore, AT&T California's interpretation is a partial reading of the statute because at the time of application, the applicant has to provide "A description of the video service area footprint that is proposed to be served…"[6] along with "The expected date for the deployment of video service in each of the areas identified in paragraph (6)."[7] These are requirements *prior* to approval of the application, to be fulfilled if the application is to be deemed complete by the

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[4] Id.

[5] Draft GO, p. 18, emphasis added.

[6] § 5840(e)(6)

[7] § 5840(e)(8)

Commission. AT&T also ignores § 5840(n), which reads: "*Prior* to offering video service in a local entity's jurisdiction, the holder of a state franchise *shall* notify the local entity that the video service provider will provide video service in the local entity's jurisdiction." This is a public notice, too, supplied to potential competitors or the "incumbent" provider of video services in that area. Additionally, § 5840(o)(3) provides that:

> When a video service provider that holds a state franchise provides the notice required pursuant to subdivision (m) to a local jurisdiction that it intends to initiate providing video service to all or part of that jurisdiction, a video service provider operating under a franchise issued by a local franchising authority may elect to obtain a state franchise to replace its locally issued franchise.

The latter or "incumbent" video service provider could hardly pursue this option if it did not know of the competitor's intention to initiate providing video service in its service area. Notice of an intention is notice before the fact. Contrary to AT&T California's assertion here, the Commission's prior approval process for amendments to franchise territories is consistent with the scope of its authority conferred upon it by AB 2987.

2. Information Required in the Application

AT&T California also alleges that the draft GO and the application form go "well beyond" the limited information requirements of subsections 5840(e)(6) and (7) and (8).[8] Those subsections require "socioeconomic status information of all residents" in the service territory in question and the date for deployment of the video service. But the subsections do not specifically define what "socioeconomic status information" the Commission is to collect. The Commission's draft GO and application adopt an efficient and consistent approach for the collection of the

[8] AT&T California Comments, p. 4.

required socioeconomic information by requiring the same information for the provisioning of video service as the legislation requires for broadband service. The Commission thus relies on the statute itself for guidance and chose to define the video requirement by reference to the broadband information required by § 5960(b). Thus, the Commission here has not overstepped the bounds of its authority. Rather, it has appropriately implemented the requirements of §5840(e)(6) and (7) by using a definition and requirement which are already in the statute and information that holders are already required to provide.

3. Deployment Schedules and Notice

AT&T California's assertion that an applicant's proposed video service area footprint and expected deployment dates be treated as trade secrets is not justified by the language of the new Public Utilities Code Division 2.5.[9] Further, AT&T California has failed to provide any cite to the DIVCA to justify its request for confidential treatment. Lastly, AT&T's position is also at odds with the notification requirements of the new law which requires applicants to notify local entities that may be affected by increased or decreased video service area footprints and deployment dates. Intended deployment areas and dates for intended deployment require notice under relevant sections of Division 2.5, as the discussion above indicates. Therefore, neither the proposed area footprint nor the expected deployment dates warrant confidential treatment, but instead should remain as public information.

4. Commission Investigations

Cable providers are also concerned with the scope of Commission jurisdiction. The California Cable and Telecommunications Association (CCTA)

[9] AT&T California Comments, pp. 4-5.

asserts that "any interpretation of § 5890(g)[10] allowing the Commission to open any investigation on its own, or upon complaint by a local entity, on any matter within the entire scope of the Legislation unlawfully expands the Commission's limited and ministerial authority."[11] The plain language of the legislation is in direct opposition to CCTA's assertion. Indeed, the statutory language not only refers to complaints from local governments regarding the requirements of "this section," meaning § 5890, but *also* to the authority of the Commission to "suspend or revoke the franchise if the holder fails to comply with the provisions of *this division*." "This division" refers to the new Division 2.5 of the Public Utilities Code, *The Digital Infrastructure and Video Competition Act of 2006*, which is the entire video franchising law, not merely one section of it. Thus, AT&T California is also incorrect when it asserts that "there is nothing in this or any other section of the bill that provides the Commission the authority to open investigations on issues outside § 5890."[12]

B. Protests to Applications

While AT&T California and SureWest are silent about allowing protests, Verizon agrees with the Rulemaking's tentative decision to delegate the application review process to the Executive Director and to disallow protests to video franchise applications.[13] Verizon comments that the short time frame available for review of an application and issuance of a franchise does not accommodate the time frame normally required by the Commission for protests.

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[10] "Local governments may bring complaints to the state franchising authority that a holder is not offering video service as required by this section, or the state franchising authority may open an investigation on its own motion. The state franchising authority shall hold public hearings before issuing a decision. The Commission may suspend or revoke the franchise if the holder fails to comply with the provisions of this division."

[11] CCTA Comments, p. 10.

[12] AT&T California Comments, p. 11.

[13] Verizon Comments, pp. 6-7.

Further, Verizon notes that the application process is largely ministerial and thus, any proposal to consider additional factors would violate § 5840(b), which "strictly limits the application process and the Commission's authority to the provisions of § 5840."[14]

DRA, local governments and consumer groups disagree. As DRA noted in its Opening Comments,[15] DIVCA does not expressly disallow protests to state video franchise applications. Additionally, the requirement that the applicant for a state video franchise deliver a copy of the application "to any local entity where the applicant will provide service"[16] set forth in AB 2987, indicates that local entities and others should have the opportunity to bring concerns regarding the incompleteness of an application to the Commission.

The League of California Cities and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (SCAN NOTOA) also support the requirement that local entities be informed of an application for a state video franchise if the applicant proposes to provide service in their area. SCAN NOTOA comments that "no valid purpose would be served by such notice if local entities could not protest or otherwise comment on the grant of such an application or, at the very least, notify the Commission of areas in which the application might be deemed incomplete."[17] They cite the "unique evidence" local governments may have regarding "an applicant's financial, legal, and technical qualifications…,"[18] experience that would prove even more relevant

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[14] Verizon Comments, pp. 6-7 and fn 12.

[15] DRA Comments, p. 3.

[16] DRA Comments, p. 3, citing § 5840(e)(1)(D).

[17] Joint Opening Comments of the League of California Cities and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (SCAN NOTOA), p. 9. The cities of Arcadia, Walnut, Long Beach and Redondo Beach agree. All four cities filed the same comments under separate signatures. See Initial Comments in City of Walnut [sic], pp. 2-4.

[18] SCAN NOTOA Comments, p. 9.

during the renewal process. Accordingly, they also recommend "a limited and expedited protest procedure…"[19] to the franchise process.

The City of Pasadena likewise "strongly advises that the statewide video franchising process should allow local governments, other entities, and members of the public to comment on and, when appropriate, protest video franchise applications."[20] The Consumer Federation of California also notes that "the Commission has delegated its authority to review the [state video franchise] application and issue the franchise to its Executive Director, without any guidelines for exercise of that delegated power."[21] Moreover, they point out, "No provision is made in the General Order for denial of a franchise or any process to challenge the denial of a franchise."[22] Finally, in opposition to the view that the Commission's role is strictly ministerial, the Consumer Federation observes that "The Commission was not expected to rubber stamp applications; it was expected to ensure compliance with the law."[23]

Before a franchise is granted, DIVCA requires the Commission to ensure that franchise applicants are in compliance with all requirements of the law. The obligations for the renewal process are more strenuous yet. The Commission and the process itself only stand to benefit from an open and robust approach to the review and granting of statewide video franchises. Therefore, consistent with the majority of the comments received, the Commission should adopt DRA's proposal to add a protest provision to the draft GO.

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[19] SCAN NOTOA Comments, p. 10; SCAN NOTOA recommend a 20 day protest period, as does TURN; TURN Comments, p. 5.

[20] City of Pasadena Comments, p. 2.

[21] Consumer Federation of California Comments, p. 4.

[22] Id.

[23] Id., citing § 5810(3) ("… to ensure full compliance with the requirements of this division.")

C. Reporting Requirements

1. Additional Reports

AT&T California objects to Section VII.E. of the draft GO, which states:

> The Commission has broad authority to require additional reports consistent with AB 2987. If a legitimate need arises, the Commission will request additional data from State Video Franchise Holders."

AT&T California contends that no such authority can be consistent with AB 2987 even if the Commission deems the need legitimate.[24] To the contrary, it is necessary that the Commission be able to obtain information above and beyond that which is specifically enumerated in DIVCA in order to fulfill its statutory duties under DIVCA. The Commission is statutorily required to enforce the following:

- The Commission must prohibit the holding of multiple franchises though separate subsidiaries or affiliates and must therefore collect information to fulfill this obligation;
- The Commission must determine the completeness and incompleteness of applications (§ 5840(h)(1-4), which requires the Commission to collect all relevant information;
- The Commission must enforce the provision that "It is unlawful to provide video service without state or locally issued franchises,"[25] and collect information accordingly (§ 5840(f);
- The "Commission may review the holder's proposed video service area to ensure that the area is not drawn in a discriminatory manner,"[26] and thus collect information to identify possible discrimination;

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[24] AT&T California Comments, p. 9.

[25] § 5840(k).

[26] § 5890(d).

- The Commission "may open an investigation on its own motion" to ensure compliance with Division 2.5;[27]
- The Commission must enforce, and thus gather information to enable enforcement of § 5940 which states that "the holder of a state franchise under this division who also provides stand-alone, residential, primary line, basic telephone service shall not increase this rate to finance the cost of deploying a network to provide video service;"
- The Commission must enforce the prohibition against an increase in rates for residential, primary line, basic telephone service above the rate as of July 1, 2006, until January 1, 2009…"[28] and gather information to guarantee this; and
- The Commission must be able to gather information to enforce § 5860(f) regarding the determination of gross revenue where video services may be bundled with other services and "*reasonable* comparable prices for the product or service for the purposes of determining franchise fees…" must be verified.[29]

Moreover, the specifically enumerated information should be viewed as the absolute minimum required, not a prohibition against requiring other information necessary for the Commission to perform the duties the Legislature has assigned to it. The Commission should reject AT&T's assertion and retain Section VII. E of the draft GO.

2. Build-out

Both Verizon and AT&T California oppose the inclusion of "expected deployment information" (Question 17 of the draft Application) alleging that it

[27] § 5890(g).

[28] § 5950

[29] § 5860(f); emphasis added.

seeks information at a level that is more granular than the Act specifies for the application.[30] DRA disagrees. The DIVCA legislation requires that the application provide "A description of the video service area footprint that is *proposed* to be served, as identified by a collection of United States Census Bureau Block numbers (13 digit) or a geographic information system digital boundary meeting or exceeding national map accuracy standards."[31] Thus, applicants should be required to disclose their deployment information in the application. The Commission should retain the question in the draft Application.

D. Bonding Requirement

The City of Pasadena comments that "the $100,000 bond [as proposed in the draft GO] is not sufficient for a city the size of Pasadena, and certainly would not adequately protect local governments and the public across much larger franchise areas."[32] The draft GO currently reads:

> The financial statement must demonstrate that [the] Applicant possesses a minimum of $100,000 of unencumbered cash that is reasonably liquid and readily available to meet expenses. Alternatively, the Commission will accept a bond in the amount of $100,000.[33]

Pasadena recommends that the Commission require minimally a bond of "at least $500,000, or $100,000 for every 20,000 customers served, *whichever of these two*

[30] Verizon Comments, pp. 11-13.

[31] § 5840(e)(6).

[32] City of Pasadena Comments, p. 3.

[33] Draft GO (Attachment B), IV.A.1.a), p. 10.

options is greater."[34] While not endorsing any particular set of bond amounts, DRA supports the Commission's consideration of a sliding or tiered scale for establishing a bond or unencumbered cash amount.

E. Multiple Franchises

While AT&T California supports the OIR's proposed limitation of one state video franchise per company, it claims that § 5840(f) does not authorize the Commission to require the franchise to be held by the applicant's parent corporation.[35] Whether or not the parent corporation is the *holder* of the video franchise or it is the parent company's *operating entity* within the state, the essential requirement of § 5840(f), as the Commission describes in the OIR is that "a corporation with wholly owned subsidiaries or affiliates is eligible only for a single state-issued franchise," and that the Commission, as the section states, "prohibit the holding of multiple franchises through separate subsidiaries or affiliates."[36] Accordingly, the Commission should have the flexibility to determine the operating entity of a corporation that shall hold the *single* franchise on behalf of the corporation and its subsidiaries and affiliates in the state. However, notwithstanding which operating entity should hold the franchise, the Commission should require the identification of the parent company, if any, on every state video franchise application.

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[34] City of Pasadena Comments, p. 3. SCAN NOTOA recommends that the Commission "require a bond or unencumbered cash in an amount that varies by service provider, based on the potential number of subscribers in its proposed service area." SCAN NOTOA Comments, p.14. They add in a footnote that "Commenters recommend a sliding scale bond requirement based on the number of homes passed in the provider's service area, with a minimum of $100,000, and maximum of $10,000,000." Id., at 14, note 18.

[35] AT&T California Comments, pp. 5-7; cf. Verizon Comments, pp. 1-2: "…corporate parents like Verizon's are structured purely as holding companies rather than operating entities, and do not hold the necessary state and local operating permits to provide service."

[36] Rulemaking, p. 12.

F. Intervenor Compensation

Opponents of intervenor compensation, cite to, among other things, the fact that DRA has been authorized under DIVCA to advocate on behalf of video customers in specified areas, as though that settled the matter.[37] This fact alone should not be used as an excuse to deny others intervenor compensation, where appropriate. DRA recommends a process for entertaining protests in the application and renewal stages. Given the multiplicity of interests at play in the authorization of video franchising, no one entity can speak for all consumers, nor should one be expected to. DRA's role in advocating for consumers of video services under the Act should not be used as an excuse to deny others access to the Commission on terms that allow that access to be effective.

III. CONCLUSION

For the reasons stated above, DRA recommends that the Commission adopt all of our recommendations set forth in our opening comments and herein. Attached to these reply comments is DRA's errata to page 35 of the draft GO. This errata corrects and replaces DRA's proposed changes to page 35 of the draft GO submitted on October 25, 2006.

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[37] SureWest Opening at 18.

Respectfully submitted,

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telephone service to ensure compliance with Public Utilities Code § 5940 prohibition against cross-subsidy.

F. Additional Information

The Commission has broad authority to require additional reports consistent with AB 2987. If a need arises, the Commission will request additional data from State Video Franchise Holders.

G. Enforcement of Reporting Requirements

The State Video Franchise Holder has the obligation to comply with all regulations adopted in this General Order. Failure to comply with a reporting requirement may trigger an investigation by the Commission and could subject the State Video Franchise Holder to either a suspension or revocation of the State Video Franchise.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES** in **R.06-10-005** using the following service:

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Executed on **November 1, 2006** at San Francisco, California.

/s/ PERRINE D. SALARIOSA
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